August 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.9 Discretion

Insert the following text before the last paragraph on page 20:

In *Maldonado v Ford Motor Co*, ___ Mich ___, ___ (2006), the Supreme Court adopted "as the default abuse of discretion standard" the standard articulated by the Court in *People v Babcock*, 469 Mich 247, 269 (2003). According to the *Maldonado* Court:

> "[In *Babcock*, t]his Court stated that 'an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.' *Babcock, supra* at 269. The *Babcock* Court further noted that '[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. *Id*.'" *Maldonado, supra* at ___.

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.35 Medical Malpractice—Expert Testimony

E. Specialists and the Standard of Care

Insert the following text on page 98 after the last paragraph in this subsection:

A plaintiff's expert witness's credentials need not match the defendant's expert witness's credentials in every respect. *Woodward v Custer*, ___ Mich ___, ___ (2006). According to the *Woodward* Court:

> "[T]he plaintiff's expert [is only required] to match one of the defendant physician's specialties. Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." *Woodward, supra* at ___.

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.18 Change of Venue

C. Change of Proper Venue—MCR 2.222

Insert the following text before the last sentence in the last full paragraph on page 159:

However, "a foreign plaintiff's choice of forum is entitled to less deference than that accorded to a domestic plaintiff's choice of forum." *Radeljak v DaimlerChrysler Corp*, ___ Mich ___, ___ (2006) (expressly modifying the Court's statement in *Anderson, supra**).

**Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619 (1981).

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.18 Change of Venue

C. Change of Proper Venue—MCR 2.22

In *Radeljak v DaimlerChrysler Corp*, ___ Mich ___, ___ (2006), the Supreme Court reversed the Court of Appeals decision in *Robey v Ford Motor Co*, 155 Mich App 643 (1986), to the extent that *Robey* held that a court cannot decline jurisdiction unless the exercise of such jurisdiction would be seriously inconvenient. Therefore, delete the paragraph directly before sub-subsection (1) on page 160 and insert the following case summary in its place:

A trial court is not limited to dismissing a case on the basis of the forum non conveniens doctrine only when the forum is "seriously inconvenient." *Radeljak v DaimlerChrysler Corp*, ___ Mich ___, ___ (2006).

In *Radeljak, supra*, the plaintiffs, who were residents and citizens of Croatia, were involved in a car accident in Croatia. *Radeljak, supra* at ___. The plaintiffs claimed that the accident resulted from a defect in the vehicle they were driving. Because the vehicle they were driving at the time of the accident was designed and manufactured in Michigan, the plaintiffs filed their lawsuit in the Wayne County Circuit Court. *Id*. at ___. The defendant moved for summary disposition on the basis of forum non conveniens, and the trial court granted the motion. *Id*. at ___.

Citing its ruling in *Robey v Ford Motor Co*, 155 Mich App 643 (1986), the Court of Appeals reversed the trial court's decision because Wayne County was not a "seriously inconvenient" forum. *Radeljak, supra at* ___. In *Robey, supra*, the Court stated:

> "When a party requests that a court decline jurisdiction based on the doctrine of forum non conveniens, there are two inquiries for the court to make: whether the forum is inconvenient and whether there is a more appropriate forum available. If there is not a more appropriate forum elsewhere, the inquiry ends and the court may not resist imposition of jurisdiction. If there is a more appropriate forum, the court still may not decline jurisdiction unless its own forum is seriously inconvenient." *Robey, supra* at 645.

Noting that the "seriously inconvenient" language was not included in the test adopted in the leading Michigan case on forum non conveniens, *Cray v Gen Motors Corp*, 389 Mich 382 (1973), the Supreme Court reversed the Court of Appeals. *Radeljak, supra* at ___. The Court further stated that "imposing a 'seriously inconvenient' requirement is [also] inconsistent with [its] holding in *Cray, supra,* [] that it is 'within the discretion of the trial judge to decline jurisdiction in such cases as the convenience of the parties and the ends of justice dictate.'" *Radeljak, supra* at ___.

In rejecting the "seriously inconvenient" requirement on which the Court of Appeals relied, the Supreme Court overruled *Robey, supra*, to the extent that it held otherwise. *Radeljak, supra* at ___.

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.22 Dismissal

E. Involuntary Dismissal as a Sanction—MCR 2.504(B)(1)

Insert the following text after the first paragraph on page 166:

A trial court has the authority to impose appropriate sanctions—including dismissal—in order to contain and prevent abuses and ensure the orderly operation of justice. *Maldonado v Ford Motor Co*, ___ Mich ___, ___ (2006). In *Maldonado*, the plaintiff and her counsel ignored a trial court's order suppressing "unduly prejudicial" evidence concerning the defendant's expunged criminal record and "engaged in a concerted and wide-ranging campaign . . . to publicize the details of the inadmissible evidence through the mass media and other available means." The trial court ultimately sanctioned the parties' misconduct by dismissing the plaintiff's lawsuit after having expressly warned the plaintiff and her counsel that violation of the court's order would result in dismissal. Said the *Maldonado* Court:

> "The trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct but also serve as a deterrent to other litigants." *Maldonado, supra* at ___.

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.57 Attorney Fees

B. Evidentiary Hearing

Add the following text on page 245 at the end of the paragraph immediately before subsection (C):

But see *Omdahl v West Iron Co Bd of Ed*, ___ Mich App ___, ___ (2006) (self-represented attorney who prevailed in a proceeding under the Open Meetings Act, MCL 15.261 *et seq.*, was entitled to attorney fees).

D. Statute Provides for Attorney Fees

Add the following text on page 245 at the end of the only paragraph in this subsection:

See also *Omdahl v West Iron Co Bd of Ed*, ___ Mich App ___, ___ (2006) (where self-represented attorney was awarded attorney fees under MCL 15.271(4) in the Open Meetings Act).

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.58 Sanctions

C. Dismissal

Insert the following text on page 247 before the last phrase in the first paragraph of this subsection:

See also *Maldonado v Ford Motor Co*, ___ Mich ___, ___ (2006) (trial court dismissed plaintiff's lawsuit as a sanction for violating a court order where there was a substantial likelihood that the plaintiff's misconduct would have materially prejudiced the proceedings).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.4 Attorneys—Right to Counsel—Substitute Counsel

A. Right to Counsel

Insert the following text after the first paragraph on page 278:

Where a defendant who does not require appointed counsel is wrongly denied his or her Sixth Amendment right to counsel of choice, the constitutional violation is complete and the defendant's conviction must be reversed; the defendant need not show that he or she was denied a fair trial or that his or her actual counsel was ineffective. *United States v Gonzalez-Lopez*, 548 US ___, ___ (2006). Said the Court:

> "Where the right to be assisted by counsel of one's choice is wrongly denied, . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez-Lopez, supra* at ___.

Violation of a defendant's Sixth Amendment right to counsel of choice is a structural error and is not subject to harmless-error analysis. *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

D. Where Did the Search Take Place?

7. Searches of Parolees or Probationers

Insert the following text after the July 2006 update to page 338:

See also *United States v Conley*, ___ F3d ___, ___ (CA 6, 2006), where the Sixth Circuit ruled that ordering a probationer—even a probationer convicted of a "white collar" crime—to submit a DNA sample did not require individualized suspicion and did not violate the prohibition against unreasonable searches. According to the Court:

> "In view of [the defendant]'s sharply reduced expectation of privacy, and the minimal intrusion required in taking a blood sample for DNA analysis for identification purposes only, the government's interest in the proper identification of convicted felons outweighs [the defendant's] privacy interest. Under a totality of the circumstances analysis, the search is reasonable, and does not violate the Fourth Amendment." *Conley, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

A. Generally

By order issued June 29, 2006, the Michigan Court of Appeals vacated its first opinion in *People v Greenfield* (discussed in the June 2006 update to page 361) and issued an opinion identical to the first with the exception of footnote six (discussed below). In the June 2006 update to page 361, change the citation to *People v Greenfield (On Reconsideration)*, ___ Mich App ___ (2006), and insert the following language after the existing text:

> **Note:** By order issued June 29, 2006, the Michigan Court of Appeals vacated its first opinion in *People v Greenfield* and issued an opinion identical to the first with the exception of footnote six. In footnote six of its reissued opinion, the Court expressly recognized that MCR 6.201 applies only to felony crimes. Footnote six as it appears in the second *Greenfield* opinion reads as follows (added language appears in bold):
>
> > "MCR 6.201 applies to discovery in both the district and circuit courts of this state. See *People v Sheldon*, 234 Mich App 68, 70–71; 592 NW2d 121 (1999); *People v Pruitt*, 229 Mich App 82, 87–88; 580 NW2d 462 (1998). **We recognize that, in Administrative Order 1999-3, our Supreme Court made clear that, contrary to a statement in *Sheldon, supra*, MCR 6.201 applies only to criminal felony cases. While, as a multiple offender, defendant Greenfield was clearly charged with a felony in this case, we reiterate for the bench and bar that MCR 6.201 does not apply to misdemeanor cases.**" *People v Greenfield (On Reconsideration)*, ___ Mich App ___, ___ n 6 (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.58 Sentencing—Sexually Delinquent Person

C. Application

Delete the April 2006 update to page 463 and insert the following text after the first paragraph in this subsection:

**People v Buehler (Buehler I)*, 268 Mich App 475 (2005), vacated 474 Mich 1081 (2006) *(Buehler II)*.

In *People v Buehler (On Remand) (Buehler III)*, ___ Mich App ___, ___ (2006), the Court of Appeals determined that the legislative sentencing guidelines would apply to any sentence of imprisonment imposed on the defendant for his conviction of indecent exposure as a sexually delinquent person. The Court further found that under the statutory sentencing guidelines the trial court's sentence of probation would represent a departure for which the court failed to articulate substantial and compelling reasons. However, noting that amendments to MCL 750.335a effective after the Court released its first opinion in this case,* might result in a different outcome for crimes occurring after the amendment's effective date, the Court concluded that MCL 750.335a as it appeared at the time the instant offense was committed controlled its review of the case. Because MCL 750.335a, before it was amended, permitted a court to exercise its discretion and impose a sentence of probation rather than imprisonment, the *Buehler III* Court affirmed its previous ruling that probation was an appropriate penalty for the defendant's conviction. (A more detailed discussion of the case's history appears below.)

> **Note:** 2005 PA 300's amendment to MCL 750.335a may have eliminated a sentencing court's discretion with regard to the penalty imposed for conviction of MCL 750.335a(1). See MCL 750.335a(2)(c). This issue has not yet been addressed.

In *People v Buehler (Buehler II)*, 474 Mich 1081 (2006), the Supreme Court remanded the case to the Court of Appeals to consider whether the trial court's admitted departure (sentencing the defendant to probation rather than prison) was properly justified by substantial and compelling reasons and "whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a." *Buehler II, supra* at ___.

Using the rules of statutory construction, the *Buehler III* Court concluded that the legislative guidelines applied to any sentence of imprisonment imposed on

the defendant because the applicable guidelines statute, MCL 777.16q, was more recently enacted than was the more specific statute, MCL 750.335a. *Buehler III, supra* at ___. According to the Court:

> "It is a well-settled tenet of statutory construction that when a conflict exists between two statutes, the one that is more specific to the subject matter generally controls. *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). However, it is equally well settled that among statutes that are pari materia, the more recently enacted law is favored. *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997). The rules of statutory construction also provide that inconsistencies in statutes should be reconciled whenever possible. *People v Budnick*, 197 Mich App 21, 24; 494 NW2d 778 (1992).
>
> "Applying these rules to the instant case so as to reconcile the statutes at issue as nearly as possible, we find that even though MCL 750.335a is more specific with respect to the term of imprisonment that may be imposed for a conviction of indecent exposure as a sexually delinquent person, the intent of the Legislature is best expressed in the more recently enacted sentencing guidelines, which are therefore controlling when a trial court elects to impose imprisonment for such a conviction." *Buehler III, supra* at ___ (footnote omitted).

Recognizing that the prospective application of this reasoning to the two statutes as they currently read might result in a different outcome—MCL 750.335a, amended effective February 1, 2006, is more recently enacted than MCL 777.16q—the *Buehler III* Court expressed no opinion about whether the guidelines statute or the statute specific to the offense would apply to future convictions under MCL 750.335a(2). *Buehler III, supra* at ___ n 4.

With regard to the conviction at issue in the instant case, MCL 750.335a (at the time the Court first decided this case), specified the term of imprisonment to be imposed for a conviction *if* the court sentenced a defendant to a term of imprisonment. Because the *Buehler I* Court concluded that probation was a proper alternative to imprisonment, the Court did not address the applicability of MCL 777.16q, nor did it address the sentencing court's departure from the recommended sentence under the guidelines. As directed by the Supreme Court, however, the *Buehler III* Court considered the departure issue and found that the trial court's reasons for imposing a sentence of probation, rather than the penalty recommended under applicable sentencing guidelines, were not objective and verifiable as required by MCL 769.34(2) and *People v Babcock*, 469 Mich 247, 257–258 (2003). Specifically, the *Buehler III* Court stated:

> "[W]e find that the trial court's stated reasons for sentencing defendant to probation—that defendant was maintaining his sobriety and, in the court's opinion, possessed the ability to control

> his conduct when he was not drinking—are not objective and verifiable. Indeed, whether defendant possesses the ability to control his conduct when not drinking is a subjective determination not external to the minds of the judge, defendant, or others involved in the sentencing decision." *Buehler III, supra* at ___.

Because the *Buehler III* Court decided that this case was governed by the version of MCL 750.335a that gave the sentencing court discretion over whether to sentence the defendant to a term of imprisonment, and because the general probation statute, MCL 767.61a, did not exempt MCL 750.335a from its scope, the *Buehler III* Court reaffirmed the conclusion in *Buehler I* that a sentence of probation under MCL 767.61a was a permissible alternative to the sentence of imprisonment recommended by the sentencing guidelines. Said the *Buehler III* Court:

> "Having resolved the questions addressed to us, we nonetheless reaffirm the trial court's imposition of a probationary sentence for the reasons stated in our prior opinion, which we observe was vacated by our Supreme Court rather than overruled. We do so because we conclude that resolution of these two questions does not call into question our prior analysis of whether defendant's probationary sentence was a lawful alternative to a prison sentence under the version of MCL 750.335a in effect at the time defendant committed the instant offense." *Buehler III, supra* at ___.